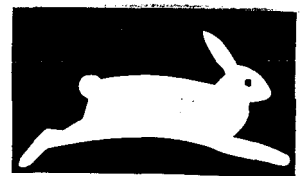


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PETA

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November 2, 2001

Ann Terbush, Chief
Permits Division
National Marine Fisheries Service
Room 1312
1315 East-West Hwy.
Silver Spring, MD 20910

Re: Comments on Proposed Permit Regulations

Dear Ms. Terbush:

The following comments are submitted by People for the Ethical Treatment of Animals (PETA). PETA is an international nonprofit organization with more than 750,000 members and supporters dedicated to animal protection. The comments are in reference to the proposed amendments to the permit regulations promulgated under the Marine Mammal Protection Act (MMPA) 66 Fed. Reg. 35,209-220. The proposed regulations are designed to implement the 1994 amendments to the MMPA.

PETA supports the **NMFS'** efforts to ensure that captive marine mammals are provided with adequate protection and care in both domestic and foreign facilities. In general, the proposed regulations reflect NMFS' attempts to improve insufficient policies. However, PETA believes that the MMPA permits NMFS and other government agencies far greater authority over the care of captive marine mammals than these agencies have acknowledged or accepted in the past. Current government-wide insufficiencies in the implementation of the MMPA are well illustrated by the recent importation and subsequent illegal use and abuse of polar bears by the Mexican-based Suarez Bros. Circus in Puerto Rico. As the plight of the polar bears in the Suarez Bros. Circus demonstrates, the welfare of captive marine mammals must be the top priority of the proposed regulations.

Despite efforts of the public display industry to weaken NMFS' authority via the 1994 MMPA amendments, PETA believes that captive marine mammal welfare remains within the province of **NMFS'** authority under MMPA. NMFS should continue to take the necessary regulatory actions to strengthen the administrative protection for marine mammals held in public display facilities. Ample authority is provided under the MMPA for NMFS to take such action while still adhering to the principles set forth in the 1994 MMPA amendments, respecting the sovereignty of foreign nations, and avoiding unnecessary interference with the roles of other

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agencies. PETA believes that the proposed regulations should be modified to help achieve these goals.

I. Public Display

As an initial matter, PETA strongly believes that traveling displays and exhibits, by their very nature, cannot and do not provide environments for marine mammals which comport with the policies or the requirements of the MMPA and the AWA. Again, in no case is this more evident than in the current situation where seven polar bears are suffering, at this very moment, in undersized transport cages as they are carted around from one hot, humid climate to another throughout Central and South America and the Caribbean. In the past, NMFS has acknowledged this same concern and thus the agency denied an application for an import permit to a traveling exhibit which planned to use dolphins. PETA urges NMFS to re-evaluate the appropriateness of maintaining marine mammals in such exhibits under any circumstances but, **as** an interim measure, supports proposed regulations that would increase the probability of more humane treatment for marine mammals who are used in traveling exhibits.

As discussed below, PETA believes that the MMPA authorizes and, in fact, requires NMFS to take the necessary steps to ensure the continuing welfare of all marine mammals who are imported and used for public display.

11. Interagency Coordination

Four federal agencies are responsible for issues related to the care and maintenance of captive marine mammals —NMFS shares MMPA management responsibility with the U.S. Fish and Wildlife Service (FWS). These agencies are required to consult with the Marine Mammal Commission (MMC), which is composed of experts in marine ecology and mammalogy who are responsible for overseeing enforcement of the MMPA. In addition, the **Animal** and Plant Health Inspection Service (APHIS) is responsible for administering the Animal Welfare Act (AWA).

Since all of the above government entities four federal agencies will be affected by the implementation of the proposed regulations, it stands to reason that all four should be involved in the process of developing the proposed regulations, especially NMFS and FWS because the two agencies share responsibility for the MMPA permit program. Moreover, PETA believes that deference to comments and other contributions to this effort made by the MMC is critical due to the Commission’s expertise in the area. Certainly, such an approach would be consistent with Interagency Agreement among **NMFS**, **FWS** and **APHIS**, effective August 1, 1998. Unfortunately, it is apparent that the proposed regulations were developed without crucial input from those with exceptional expertise, such as the MMC.

PETA believes that the efforts of these agencies should be coordinated and that joint regulations should be published whenever possible. In addition, PETA specifically requests that FWS and **NMFS**, in cooperation with the MMC, establish joint **MMPA** permit standards. The current regulations will be strengthened and administered more effectively if they reflect the combined efforts of all of the above entities. PETA would support additions to the proposed regulations to

mandate coordination between NMFS, FWS, MMC, and APHIS during development and finalization processes for marine mammal regulations.

111. Administration of the MMPA to Ensure Proper Care of Captive Marine Mammals

In the past, the public display industry has consistently argued that administration of the **MMPA** applies only to the capture and removal of individuals from wild populations. Using this argument, the industry has attempted to relax public display facility operating standards by denying the authority of NMFS and FWS over the regulation of captive marine mammals and stripping the MMPA of its emphasis on ensuring the humane treatment of marine mammals held for public display. To this end, the industry lobbied for MMPA amendments in 1994 to weaken the **MMPA**.

Fortunately, the 1994 amendments did not cripple the **MMPA** and its fundamental policies of protecting and recovering wild populations, promoting the health and stability of the marine environment, **and** requiring the protection and humane treatment of individual marine mammals, including those in captivity.

Contrary to the claims of the industry, the MMPA is not limited to protecting only species, population stocks, and habitat. The law also provides protection to individual marine mammals in captivity through:

- The prohibitions set forth in section 102(a) of the Act, which make the unauthorized taking of “any marine mammal” by anyone subject to U.S. jurisdiction unlawful. 16 U.S.C. § 1372(a);
- The prohibitions in section 102(b) and 102(c) on the unauthorized import of “any marine mammal.” *Id.* § 1372(b) and (c);
- The policy goal, which recognizes that marine mammals “move in interstate commerce” (which clearly covers animals held in public display facilities) and are therefore subject to the Act’s “protection.” *Id.* § 1361(5);
- The definition of “marine mammal,” which means “any mammal” adapted to the marine environment. *Id.* § 1361(6);
- The definition of “take” to mean to “harass, hunt, capture, or kill, or attempt to harass, hunt, capture or kill any marine mammal.” *Id.* § 1361(13);
- The definition of “humane to mean taking,” which involves the least possible degree of pain and suffering practicable to the mammal involved. *Id.* § 1361(4); and
- The requirement under section 104(b)(2)(B) that all permitted taking be conducted in a “humane” manner, that is, **as** defined in section 3, that method of taking “which involves the least possible degree of pain and suffering practicable to the mammal involved.” *Id.* § 1374(b)(2)(B).

Protection for individual marine mammals also is found in the permit issuance process of sections 101(a)(1) and 104. These permits, which are available for taking or importation of “any marine mammal” for scientific research, public display, photography, and species enhancement purposes, are subject to terms and conditions designed to protect the animals involved. Id. §§ 1374(b)(2)(D) and 1374(c)(1).

These are just a few examples of provisions in the MMPA that focus on the welfare of individual marine mammals. The emphasis on the protection of individual captive marine mammals in the above citations illustrates the statutory foundation for NMFS’ proposed regulations and continued involvement in the regulation of the care and maintenance of captive marine mammals.

Section 112(a) of the MMPA grants NMFS and FWS broad authority to “prescribe such regulations as are necessary and appropriate to carry out the purposes” of the Act. Id. § 1382(a). NMFS has considerable discretion in constructing regulations, but given NMFS and FWS’ rulemaking authority, the emphasis in the MMPA on protecting individual marine mammals, and the inclusion of public display permit issuance responsibilities under the Act, the public display industry cannot argue that NMFS lacks a basis under the MMPA to promulgate the proposed regulations. As stated by Congress in reference to permits for “public and privately owned oceanariums”: “strict regulations are to be imposed by this legislation on such practices.” S. Rep. NO. 863, 92nd Cong. 2d Sess. 8 (1971). The proposed regulations can be enhanced with notice and comment. Notwithstanding the request revision and the aforementioned concern with regard to interagency coordination, PETA concurs with the NMFS’ fundamental objectives and supports the promulgation of these regulations.

IV. NMFS’ Role in Protecting Marine Mammals in Captivity

On October 11, 2001, the American Zoo and Aquarium Association and the Alliance of Marine Mammal Parks and Aquariums (“the Zoo Alliance”) gave testimony on the MMPA reauthorization process and criticized the **NMFS** for overstepping its bounds by establishing standards for the care and maintenance of captive marine mammals. Although the 1994 amendments did weaken the **MMPA**, they did not eliminate NMFS’ role in regulating the care and maintenance of captive marine mammals.

Before turning to the specifics of the MMPA that confer upon NMFS the authority not only to promulgate regulations of this nature, but also to remain involved in domestic care and maintenance issues, it is necessary to understand the differences between the MMPA, which NMFS administers, and the AWA, which APHIS administers. These are not duplicative statutes. They address different congressional priorities. The policy objectives and goals of the MMPA do not end when the door to the transport cage is closed, and the NMFS’ legitimate role in regulation of marine mammals in captivity persists beyond the point of capture and import. PETA does not believe that NMFS should duplicate the efforts of another agency, but, clearly, legitimate MMPA concerns continue to follow marine mammals whenever they are located. To carry out the functions of the MMPA, Congress has **left** intact key provisions of the Act that relate to public display and captive maintenance.

As provided in section 104(c)(1), “[a]ny permit [issued for public display] shall specify, in addition to the conditions required by subsection (b) of this section, the methods of capture, supervision, care and transportation which must be observed pursuant to such taking and importation.” 16 U.S.C. § 1374(c)(1). In addition, section 104(c)(1) requires that any permittee “shall furnish to the Secretary a report on all activities carried out by him pursuant to that authority.” *Id.* Finally, section 104(b)(2)(D) requires that “any permit issued under this section shall ... specify ... any other terms or conditions which the Secretary deems appropriate.” *Id.* § 1374(b)(2)(D).

These provisions continue to provide NMFS with broad authority under the MMPA over public display facilities. These provisions remain intact from the original MMPA and were left untouched by the public display industry’s attempts to weaken the MMPA in 1994. It is also important to note that NMFS’ blanket permit conditioning authority in section 104(b)(2)(D) is not limited in any respect and implements MMPA purposes and policies, including the goal of section 2(5) to protect marine mammals in interstate commerce.

Section 104(c)(1) specifically dictates supervision, care, and transportation conditions to be observed “pursuant to such taking or importation.” Although Congress amended the MMPA in 1994 to define “harassment,” one element of the take definition, to be limited to activities involving marine mammals in the wild, there is no similar limitation regarding other elements of the take definition applicable to marine mammals, such as “capture” or the act of importation. Thus, NMFS (and FWS) remains empowered to dictate requirements with regard to capture and importation, which necessarily cover activities affecting animals after the point of capture.

NMFS’ continuing jurisdiction in this regard is confirmed by the reporting requirement of section 104(c)(1) “for all activities carried out” pursuant to the permit. Activities that occur after capture or importation are “carried out” pursuant to a permit. That information can prompt a variety of legitimate actions from NMFS, including, for example, future terms and conditions under section 104(b)(2) and 104(c)(1) and assessment of compliance with section 104(c)(2) criteria for permit issuance and permit revocation. NMFS’ continuing jurisdiction past capture/import is explained in the MMPA legislative history. As stated with reference to these, section 104(c)(1) reports: “If the Secretary is not satisfied with these activities on these reports, he may take appropriate action which includes the revocation of permits and assessment of penalties.” House Rep. No. 70-7, 92nd Cong. 1st Sess. 25 (1971).

Section 104(c)(2)(A) establishes three criteria that must be met in order to obtain a public display permit: a conservation/education program; AWA licensing or registration; and open-to-the-public facilities. However, the issuance of a permit to a party who meets these conditions is not guaranteed. NMFS may consider other factors, as dictated by MMPA purposes and policies and the humaneness requirement of section 104(b)(2)(B). These factors must, of necessity, include the applicant’s track record with regard to marine mammal care and maintenance.

In addition to these considerations at the permit application stage, NMFS remains involved in care and maintenance after permit issuance. The aforementioned permit terms and conditions provide one such basis for doing so. The requirements of section 104(c)(2)(B), which specify that the same three factors applicable to permit issuance also apply to subsequent animal

transfers, provide another instance in which NMFS must make a determination as to whether such criteria are met. Under section 104(c)(2)(D), NMFS also must monitor the permittee to ensure continued compliance with the three specified criteria. And, of course, any conditions included in the initial permit would carry forward to the new permit holder.

Finally, NMFS' continuing authority over marine mammals in captivity is provided by section 104(c)(10), which requires the agency to maintain a marine mammal inventory. This provision expressly applies to the progeny of the permitted animals and yields information that can prompt NMFS enforcement actions under permit terms and conditions and inform NMFS whether future applications from the permit holder or transferee should be granted; it also provides to the government and public a critically important database regarding the status of marine mammals held in captivity, including cause of death. Although the public display industry may not want to disseminate this information, it cannot be denied that there is a strong public interest in facts pertaining to marine mammals held in captivity. These inventory reports, even as described in the NMFS regulations, are relatively simple and straightforward. Any minor inconvenience imposed upon the industry is less important than the public's right to know.

Taken together, these **MMPA** provisions and their associated legislative history refute the argument that NMFS has no role over marine mammals in captivity. To the contrary, NMFS has important residual power in this regard, even after the 1994 amendments. PETA is deeply troubled that NMFS appears to have retreated from this mandate and has failed to exercise its powers to fulfill this role in many respects. PETA supports coordination between NMFS and APHIS and the avoidance of duplicative functions. However, abdication of statutory duties to ensure the welfare of all marine mammals is unacceptable. The regulatory regime envisioned by the Zoo Alliance, which NMFS yielded to in 1994, does not reflect the objectives of the **MMPA**. The problems inherent in the public display industry's vision of the NMFS' role in the MMPA are currently apparent in the example of the Suarez Bros. Circus in Puerto Rico and its maintenance of polar bears. The proposed regulations should be enhanced, but they are not inherently at odds with the **MMPA** or beyond the scope of NMFS' regulatory authority.

V. NMFS Regulation of Foreign Facilities

The Zoo Alliance believes that the proposed regulations raise the question of the degree to which NMFS can become involved in activities with regard to captive marine mammals at foreign facilities. NMFS does not have authority to regulate activities in foreign countries, but it does not follow that the agency has no recourse with regard to the quality of care provided at such facilities. In fact, the MMPA requires that NMFS ensure the welfare of marine mammals maintained at foreign facilities before protected animals leave the United States.

With regard to export, two MMPA requirements are clear. First, a public display permit may not be issued outright to a foreign facility. Section 102(a)(4) prohibits marine mammal exports, except pursuant to a special exception permit under section 104(c). Section 104(c)(2)(A) authorizes public display permits for taking or importation to be issued when three criteria are met, including certification that the permit holder has an **AWA** license or registration. 16 U.S.C. 1374(c)(2)(A). Because foreign facilities cannot obtain such license/registrations, they cannot

receive permits for take. Thus, foreign facilities cannot take marine mammals under United States jurisdiction.

In the case of export from a U.S. facility that holds an MMPA permit, section 104(c)(2)(B) applies. This provision includes the same three criteria as section 104(c)(2)(A). Because foreign facilities cannot obtain an MMPA license, they must satisfy the comparability requirements of section 104(c)(9). This section requires that the “receiving facility meet standards that are comparable to the requirements that a person must meet to receive a permit under this subsection for that purpose.” Id. 16 U.S.C. §1374(c)(9). NMFS must therefore make a “comparability finding in these instances.” NMFS has complete discretion over the manner in which it makes this finding, but under section 112(a), NMFS is within its rights to promulgate regulations for this purpose.

Comity letters from foreign governments are one way to address comparability, but unfortunately, these letters merely ensure that the foreign country involved enforces requirements equivalent to U.S. standards. NMFS must be able to determine that the facility itself meets the standards of section 104(c)(2)(A). NMFS can best make this determination by requiring information directly from the receiving entity, as is done for domestic facilities. And, as noted above, because the animal is still in the United States, this requirement does not violate the rule that the MMPA does not apply abroad. It is, quite clearly, protecting animals within U.S. jurisdiction from being shipped overseas. In the event that the facility fails to comply in the future, NMFS is granted the power, under section 104(c)(2)(D), to take appropriate action, including seizure of the animal. Because activities in foreign countries are involved, the comity letter becomes crucial in this situation. Under these circumstances, it would be necessary to invoke the assistance of the government of the foreign country involved.

On these grounds, it is clear that NMFS does not abdicate all responsibility for marine mammals when they leave the United States. Before they are exported, when all U.S. authority continues to apply, NMFS must ensure that the comparability requirements of section 104(c)(9) are satisfied. After export, the receiving facility must still be monitored to ensure that comparability is maintained. Here, NMFS must rely upon the United States’ comity relationship with the foreign country.

VI. Captive Release

PETA supports the requirement for a permit to release captive marine mammals. We acknowledge that there is a risk that irresponsible or unduly risky actions will be taken without such permits.

However, PETA objects to two aspects of the NMFS captive release proposal. First, PETA believes that NMFS misstates the current understanding regarding the prospect for successful release in its preamble discussion on page 35210. NMFS creates the impression that captive release is an unattainable goal without support in the scientific community. This may be NMFS’ view, but it does not reflect a consensus view of the marine mammal community, overlooks the opinion of credible experts, and disregards examples of successful release and reintroduction

programs. Like Earth Island Institute (EII), PETA believes that the preamble should be revised to read:

From the scientific perspective, the release of captive marine mammals is considered by some to be experimental. There are some scientists who question the effect of time in captivity on marine mammals' ability to survive in the wild. There are others who believe that when properly undertaken and monitored, captive release can be a benefit to the animal involved. Captivity can affect marine mammals' ability to forage in the wild, avoid predators, integrate with wild stocks, and avoid interactions with humans and vessels. A proper release program, however, may be able to address these risks. Additionally, release sometimes poses risks to wild stocks ...

Second, NMFS must discontinue its "double standard" with respect to captive release. While the NMFS criticizes the release of captive marine mammals from public displays, the agency supports similar programs undertaken by the Navy, even for "recall training" purposes, as discussed on page 35211. NMFS needs to adopt a consistent, objective, and analytically sound position on captive release. Captive release must be recognized as **an** attainable goal, when carefully and responsibly conducted, and the same stringent requirements should be applied to the Navy.

Finally, if releases are authorized under conditions for recall purposes, releases also must be allowed for routine "ocean walks" when that activity would benefit the animal involved. Such activities can be routinely undertaken to benefit specific animals, as the experience with Keiko has demonstrated. Keiko has, over a two-year period, undertaken numerous lengthy and successful walks during which he has interacted with wild populations on many occasions. This has become a part of his nature, and he has, in effect, been successfully reintroduced to the wild, disproving many of the concerns stated by NMFS in the preamble. Ocean walks of this nature may also be appropriate for other animals, so long as certain conditions are met (e.g., the animal is healthy; the "walks" take place in native waters, with qualified staff). Under these circumstances, there is no reason that such walks should be prohibited.

VII. Conclusion

PETA generally supports the proposed NMFS regulations, but the proposed regulations must be enhanced to ensure fulfillment of MMPA purposes, policies, and requirements. PETA supports the goal of an efficient, nonduplicative interagency administration of the MMPA and the AWA, but PETA believes that the NMFS must maintain its vital role in the MMPA with respect to the care and maintenance of captive marine mammals. To this end, PETA asks that the NMFS insert the requested revisions into the final MMPA regulations. Thank you for your consideration.

Sincerely,

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Stephanie Boyles, Wildlife Biologist
Research, Investigations & Rescue Department